HUSBAND & THE RIGHT OF DIVORCE

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MOULANA ATEEQ AHMAD BASTAWI, LUCKNOW | INDIA



FOREWORD BY MUFTI AHMAD KHANPURI, DHABEL | INDIA



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بسم الله الرحمن الرحيم

In the name of Allah, most gracious, most merciful

Title : HUSBAND & THE RIGHT OF DIVORCE

By : MOULANA ATEEQ AHMAD BASTAWI

FOREWORD BY MUFTI AHMAD KHANPURI, DABHEL | INDIA

Translated By:

Darul Iftaa Mahmudiyyah

Durban, South Africa

Tel: +27 31 207 4169

Website: www.daruliftaa.net | www.askimam.org | www.idealwoman.org | www.daralmahmood.org

Twitter: @Darul_iftaa

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بسم اللہ الرحمن الرحیم

MUFTI AHMED KHANPURI
Jamiah Islamiah Talimuddin,
Dabhel, Dist. Navsari. Gujarat - India

مفتي احمد خانپوری
جامعة إسلامية تعليم الدين
دابيل، ضلع نوساري، كجرات، الهند

Date :

بسم اللہ الرحمن الرحیم

بھارت کی آزادی کے بعد آزاد بھارت کا جو دستور بنایا گیا اُس میں اِس ملک کو سیکولر (secular) ظاہر کیا گیا، جس کا مطلب ہی یہ ہے کہ: بھارت کا کوئی سرکاری مذہب نہیں ہے؛ بلکہ ملک کا دستور ہر مذہب کو عزت واحترام کی نگاہ سے دیکھتا ہے، اور اس کے ماننے والوں کو اپنے مذہب پر چلنے کی مکمل آزادی دیتا ہے۔ آزاد بھارت کے دستور میں یہاں کے شہریوں کے لیے جن بنیادی حقوق کو تسلیم کیا گیا ہے اور ان کی حفاظت کی گارنٹی دی گئی ہے، اُن میں سے ایک مذہبی آزادی بھی ہے، اور اِن ہی بنیادی حقوق کے ضمن میں اس بات کی صراحت کی گئی ہے کہ: حکومت کوئی ایسا قانون نہیں بنائے گی جس کے ذریعہ یہ بنیادی حقوق ختم ہو جاتے ہوں یا اس میں کمی آتی ہو، جو قانون اس کے خلاف بنے گا وہ اپنی مخالفت کی حد تک رد اور باطل قرار دیا جائے گا۔

اِن ہی بنیادی حقوق کے ضمن میں ہر شہری کو اپنی الگ تہذیب کو محفوظ رکھنے کی گارنٹی بھی دی گئی ہے، اور ہندوستان میں بسنے والے تمام مذاہب کے لوگوں کو مکمل مذہبی آزادی حاصل ہے کہ وہ اپنے اپنے مذہب پر آزادی کے ساتھ عمل کر سکتے ہیں، حکومت اس میں کوئی دخل اندازی نہیں کرے گی، اور نہ ہی کوئی ایسا قانون بنائے گی جس کی وجہ سے بہ ذریعۂ دستور دیے گئے حقوق پر زد پڑتی ہو۔

اس کے باوجود حکومتوں کی طرف سے ''مسلم پرسنل لاء'' (FAMILY LAW) میں تبدیلی اور یونیفارم سول کوڈ تیار کرنے کی باتیں بار بار دوہرائی جاتی ہیں، اسی ضمن میں وہ حلف نامہ (AFFIDAVIT) ہے جو چند دن پہلے موجودہ حکومت کی طرف سے سپریم کورٹ میں داخل کیا گیا، جس میں سپریم کورٹ سے درخواست کی گئی ہے کہ: وہ تین طلاق اور نکاح حلالہ کو باطل قرار دیں اور تعدُّدِ ازواج پر پابندی لگائے، اسی بنیاد پر اس وقت ملک میں جو گرما گرم بحثیں ہو رہی ہیں اور میڈیا (جس کو بڑے منظّم طریقہ پر ''مسلم پرسنل لاء'' کے خلاف ذہن سازی کے لیے استعمال کیا جا رہا ہے) کی طرف سے جو مضامین شائع کیے جا رہے ہیں، اُن میں ''طلاق کا اختیار مرد کو کیوں دیا گیا؟'' اس نکتہ کو خوب اچھالا جا رہا ہے، اور مضمون نگار حضرات یہ باتیں جس انداز سے پیش کرتے ہیں ان کو پڑھ کر مسلمانوں کا اچھا خاصہ طبقہ شکوک وشبہات کا شکار ہو جاتا ہے، ضرورت تھی کہ اس مسئلہ کو واضح کیا جائے۔ حضرت مولانا عتیق حمد صاحب بستوی زید مجدہم (استاذ دار العلوم ندوۃ العلماء لکھنؤ) نے اپنی ایک تحریر میں اس اعتراض کا جو تجزیہ فرمایا وہ اِن سب شکوک وشبہات کو دور کرنے بں بڑا موثر ہے؛ اس لیے مناسب معلوم ہوا کہ اُن کی اِس تحریر کا انگریزی میں بھی ترجمہ کر کے شائع کیا جائے۔ اِس اہم فریضہ کی انجام دہی کے لیے احقر نے عزیز مکرم مولانا مفتی ابراہیم دیسائی صاحب زید مجدہم (شیخ الحدیث مدرسہ نعمانیہ ڈربن اور مشہور اسلامی اسکالر) کو درخواست کی، الحمد للہ انھوں نے بری اس درخواست کو قبول کرتے ہوئے فوری طور پر یہ کام انجام دیا۔ اللہ تعالیٰ ان کے علم وعمل میں برکت عطا فرمائے۔

مسلمانوں - اور خاص کر وہ طبقہ جو اِس طرح کے شکوک وشبہات کا شکار ہو جاتا ہے - کی خدمت میں یہ تحریر اس امید کے ساتھ پیش کی جا رہی ہے لہ: اس کو پڑھ کر ان کے ایمان ویقین میں اضافہ ہو۔ اللہ تعالیٰ ہم سب کو ایمانی قوت وغیرت عطا فرمائے۔ آمین

اُملاہ: احمد خانپوری

۱۷ محرم الحرام ۱۴۳۸ھ / ۱۹ اکتوبر ۲۰۱۶ء

Foreword

(TRANSLATION OF THE FOREWORD) BY WORLD RENOWNED MUFTI AND SPIRITUAL GUIDE, THE PRIDE OF INDIA, MUFTI AHMAD KHANPURI SAHIB

The Constitution of India that was designed after the independence of India declared India a Secular State. This implies that India does not have a state religion. Rather, the Constitution respects every religion and grants its followers complete freedom of religion.In the context of Freedom of Religion, it has been clearly stated that the Government shall not pass any law which eliminates or decreases basic fundamental rights. If such a law is passed, it will be unconstitutional.

It is within the scope of such fundamental rights that every citizen is guaranteed to preserve his culture and the adherents of all religions in India have complete Freedom of Religion. The Government cannot interfere in such rights and cannot create any law that will affect this basic Constitutional right.

Despite the guarantee of Freedom of Religion being an entrenched Constitutional right, there is repeated discussion of changing and reforming Muslim Personal Law through a civil code. Hence, a few days ago the Government filed an affidavit in the Supreme Court requesting that there should be restrictions on the laws of three talaqs, halala and polygamy. Presently, there are intense discussions and the media (which is meticulously used to brainwash against Muslim Personal

Law) has published some articles, one of which is, "Why a man has the right of talaq". These articles are presented in such a way that creates doubts in the minds of many Muslims.

Moulana Atiq Ahmad Bastawi (Lecturer at Darul Uloom Nadwatul Uloom, Lucknow) has critically analysed and answered the related issues in this treatise in such a way that it will easily dispel doubts instigated by the misleading campaign of the media and others. Seeing the relevance and the imminent threat to vulnerable Muslims, I deemed it necessary to have this treatise translated into English. To undertake this important task, I requested the honourable and respected Moulana Mufti Ebrahim Desai (Senior lecturer of Hadith at Madrasah Nu'maniyyah, Durban and a world renowned Scholar) who immediately fulfilled my request. May Allah bless him in knowledge and practice.

This treatise is therefore being presented to the Muslims in general and specifically to those who have been trapped in the net of doubts to dispel their doubts and increase their faith and conviction.

May Allah grant us all strength and consideration for Imaan. Aameen.

[Mufti] Ahmad Khanpuri
17th Muharram, 1438 A.H.
19th October, 2016.

Translators Note

I have been advised by my most revered teacher and spiritual guide, Hadhrat Mufti Ahmad Khanpuri Sahib (مد ظله) to translate the book (عائلی تنازعات کا شرعی حل اور شوہر کو حق طلاق کیوں) as a matter of urgency. It is indeed very challenging to translate such intricate academic topics.

We have endeavoured to maintain the message of the subject matter rather than a strict literal translation.

We humbly request you to overlook any shortcomings in the translation. Bear in mind, this book has been translated in one day due to the urgency of the matter. We hope to revise the translation in future Insha'Allah.

[Mufti] Ebrahim Desai

In Islam, Nikah is not a temporary enjoyment. Rather, it is a bond of love between two people which has to be revered and preserved till death. It is due to this that Islam has emphasised to both spouses to go out of their way in fulfilling every right of the other and overlooking each other's faults.

Islam has decreed that women be obedient to their husbands in all permissible acts. In doing so, she has been given glad tidings of paradise. There are many Ahadith of the Prophet Sallallahu Alaihi Wasallam in this regard:

Hadhrat Umme Salamah (RadhiyAllahu Anha) narrates that the Prophet (Sallallahu Alaihi Wasallam) said, "If a woman dies in a state wherein her husband was pleased with her, shall enter Jannah."(Sunan Tirmidhi Pg 457, Vol 2. Hadith 1161 Daral Gharbil Islamiy, Beirut 1998 edition)

It is narrated on the authority of Hadhrat Anas (RadhiyAllahu Anhu) that the Prophet (Sallallahu Alaihi Wasallam) said, "A woman shall have the honour of entering Jannah from whichever door of Jannah she pleases if she performs her five times prayers, fasts during the month of Ramadhan, safeguards her chastity and is obedient to her husband." (Hilyatul Awliya Pg. 308. Vol 6. Darul Fikr. Beirut. fourth impression.)

Hadhrat Abu Usama (RadhiyAllahu Anhu) narrates from the Prophet (Sallallahu Alaihi Wasallam),

"After attaining consciousness of Almighty Allah, the next best thing a person can get is a pious wife with the following characteristics;

she accedes to his directives, she makes him happy when he sees her, and if the husband takes an oath keeping her trust in

mind, she fulfils the oath and in the absence of the husband she safeguards her chastity and his wealth."(Sunan Ibn Majah Pg. 62 Vol.3 Daral Risalatal Alamiyyah,first impression 2009)

However, to facilitate harmony in domestic life, Islam's guidance is not one sided. There is much emphasis on the husband to be extremely kind and considerate. In fact, there is so much emphasis on the husband to be considerate to the wife that even if he does not like his wife, he is advised to display good conduct towards her.

The Qur'aan explicitly outlines this in the following verse:

﴿وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى أَنْ تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا﴾ [النساء: 19]

Translation:And show good conduct (because) if you dislike them(wives), it is possible you only dislike something and Allah might have placed a lot of good in it." (Chapter of Women: Verse 19)

Hadhrat Abu Hurairah (RadhiyAllahu Anhu) mentions that the Holy Prophet (Sallallahu Alaihi Wasallam) mentioned,

"If a man dislikes a woman, then possibly is just because of one habit wherein she may possess many other qualities." (Sahih Muslim Pg 1091 Vol 2 Dar Ihya Turath Al-arabiy. first impression.)

Islam has made a man's conduct with his spouse a yardstick to define his character.

Hadhrat Aisha (RadhiyAllahu Anha) reports that the Prophet (Sallallahu Alaihi Wasallam) mentioned, "The best amongst you is the one who has the best conduct with his wife and I am the best amongst you in terms of good conduct with my

family." (Sunan Tirmidhi Pg 709 Vol 5 Hadith 1161 Daral Gharbil Islamiy, Beirut 1998 edition)

To make the personal life harmonious and successful is the duty of both, the husband and the wife. However, the husband being the head of the house has a greater responsibility. Whenever there is discord between spouses, since the husband is in charge in terms of management, he should abandon his firmness and assertiveness and take the first step in resolving the matter.

If the discord is due to his behaviour, then he should correct himself and try to win her over, and if it is because of the incorrect attitude of the wife, then the husband should deal with her with utmost patience, love, care and wisdom. Instead of being harsh and emotional, one should involve in dialogue and try to resolve the problem amicably.

The Qur'aan provides various instructions as remedies to family dissention. If these steps are taken, then the husband and wife will easily resolve their problem.

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ
فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ
وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا إِنَّ اللَّهَ كَانَ
عَلِيًّا كَبِيرًا (34) وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا
إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا [النساء: 34، 35]

Translation: Men have charge over women (as their overseers, guardians, protectors) because of the virtue(distinction) Allah has (in His infinite wisdom) bestowed some of you over others and because of what men spend (on women) from their wealth. So the righteous women are obedient and in the absence (of their husbands), are protective of their chastity and property of their husbands) because of that (those rights of

women) which Allah has protected. As for those whose disobedience you fear, advise them; separate your bed from theirs and tap them (gently). If they obey you, then do not look for a way against them. (to wrongfully accuse them) verily Allah is most High, the greatest. And if you fear dissension between the two send an arbitrator from his people and an arbitrator from her people if they both desire reconciliation Allah will cause it between them. Indeed, Allah is ever knowing and acquainted (with all things) (Chapter of Women: Verse 34,35)

In the above verses of Surah Nisah (Chapter of Women), four stages have been outlined to bring about reconciliation.

The beginning of verse 34 says that a man is the leader of the family. The simple logic behind this is that no organisation can function without a leader. And generally men are more capable of carrying out this duty. A man is more capable in bringing about discipline and channel the energies of his household in the right avenues.

This does not necessarily imply that a man possesses unrestrained and unlimited mandate. Rather it is his duty to oversee the smooth running of the house. He is responsible of taking charge and control of family members. He has to arrange for their wellbeing and education.

In the above qouted verse, man has been appointed the caretaker and the head of the household due to two reasons:

1.Allah Ta'ala has given man a degree of virtue over women. This is understood from the following verse:

وَلَهُنَّ مِثْلُ ٱلَّذِى عَلَيۡهِنَّ بِٱلۡمَعۡرُوفِۚ وَلِلرِّجَالِ عَلَيۡهِنَّ دَرَجَةٌۗ وَٱللَّهُ عَزِيزٌ حَكِيمٌ

"Women have rights similar to what they owe in recognized manner though for men there is a step above them. Allah is Mighty, Wise." (Surah Baqarah – Verse: 228)

2. The responsibility of the maintenance and the expenses of the wife and children is on the husband.

For this reason, our jurists explicitly mention that though the wife may be rich and wealthy, her expenditure, maintenance and arrangements for living accommodations are still the responsibility of the husband even if he may be poor. A woman supports herself financially and does not load the responsibility of her maintenance on the husband, rather she bears the finances of the house through her own wealth, this will not affect the status of the husband being the caretaker.

The appointment of the man as the caretaker is due to man being given a degree of virtue over women because generally men have been more blessed with those certain capabilities which assist in the heading and taking care of the household. However, women have no less of a role than men in the structure and running of the household. The internal issues of the household and supervision is solely the responsibility of women. Men and women both play a central role in the family system. The only way the household can be successful is through their mutual trust and cooperation.

Two qualities of a righteous woman are described in verse 34 of Surah Nisaa:

1. Righteous women obey their husbands.

2. In the absence of their husbands, they protect his wealth and reputation.

The qualities of righteous wives mentioned in this verse are clarified further in the upcoming Ahadith.

حافظات للغيب can also mean that righteous wives are the confidants of the husband's secrets. In a marital relationship, secrecy and concealment (of the wife, i.e. for her to not gossip regarding her husband and vice versa) is a very important and crucial quality. This vital quality is very eloquently expressed in the Qur'an:

"They are apparel for you, and you are apparel for them." (Surah Baqarah – Verse: 187)

If any woman is unable to maintain the husband's secrets, and she divulges those secrets, and she is unable to maintain the reputation and dignity of her husband, and in the absence of her husband, she allows strangers to enter the home, then this woman is a source of destruction to her husband's morale. Rather than being a source of happiness in the personal family life of the husband, she is a source of bitterness and distaste.

This verse, after mentioning the virtuous qualities of a wife, provides a solution to bring the wife back to the correct path. If a woman does not inculcate these virtuous qualities in her, and she does not fulfil her marital duties, she does obey her

husband in lawful matters, she does not maintain and protect the wealth and reputation of her husband, she is ill-natured and mischievous, then a process with three stages and initiatives is presented to husbands to bring these types of women back to the correct path.

THE FIRST INITIATIVE: ADVICE AND COUNSEL

The concept of advice and counsel is that the husband repeatedly explains with utmost concern and care, leniency and gentleness. He should try to instil the fear of Allah, explain the consequences awaiting in the hereafter. If the wife and she veers from the correct path, and the husband counsels her and tries to make her understand with a passion to steer her back on the straight path and rectify her while understanding her nature, then by the will of Allah, he will be successful in his attempt.

Counsel does not mean to admonish her and get angry at her. To admonish her and get angry at her without taking into consideration her emotions and feelings will more often than not lead to her becoming withdrawn and unresponsive. Rather than rectifying her, hostility and animosity is created within her.

THE SECOND INITIATIVE: SEPARATION IN THE BED

If the disobedience of the woman is not resolved through advice and counsel, then the husband should display inattention and construct an invisible barrier. Some commentators of the Qur'an explain separation in the bed as abstaining from sleeping with the wife. Others explain it as abstaining from conversing, and others explain it as turning away from the wife in the bed. The sum of the various explanations is that

the husband should develop a change in the way he deals with his wife and display his disapproval to her. This stage is very effective in resolving the issue in most women.

THE THIRD INITIATIVE: SLIGHT CHASTISEMENT

If the issue is not resolved with the first two initiatives, then Shari'ah has allowed to administer a slight rap on her by hitting her lightly if he is confident that such an attitude will jolt and rectify her. However, the following conditions must be borne in mind:

1. Hitting her should not be the outcome of revenge or one's anger towards her. Rather the sole intention must be to rectify her. If it is done for revenge, then the adverse effect will be that the relationship will become even more bitter.

2. If the wife displays open disobedience, the husband can implement the reformation process presented in the Qur'an. If the first two initiatives fail to produce any results and the husband is confident that slightly hitting her will not resolve the issue, then it will be incorrect to hit her merely to finish the reformation process.

3. In any given situation, the husband is not allowed and does not have the right to beat and assault her severely. Hitting the wife to such an extent that it leaves a mark, breaks a bone, or injures her in any way has been prohibited by numerous Ahadith. It also prohibited to hit her, slightly or harshly, in the sensitives areas of her body.

Rasulullah (Sallallahu Alaihi Wasallam) mentioned on the plains of Arafat during the farewell Hajj: "Fear Allah concerning women! Verily you have taken them on the security of Allah, and intercourse with them has been made lawful unto you by words of Allah. You too have right over them, and that they should not allow anyone to sit on your bed whom you do not like. But if they do that, you can chastise them but not severely. Their rights upon you are that you should provide them with food and clothing in a fitting manner." (Sahih Muslim – V.2/PG.891 – Dar Ihya Turath Al Arabi)

4. It is not necessary and not advisable to slightly hit women after the first two initiatives fail to reform her. It is merely allowed in the case of extreme necessity. Islam does not condone the hitting of wives, rather Islam discourages hitting women. Islamic law concedes slight chastisement of women in certain scenarios with certain conditions since maintaining and improving the household can only be achieved through it in certain societies. But to the contrary, Islam encourages such practices through which utmost consideration is given to maintaining the respect of women. Hitting is a distant notion, in fact wives should not even be spoken to harshly!

There were incidents during the time of Rasulullah (Sallallahu Alaihi Wasallam) when the Sahabah (Radiyallahu Anhum) brought complaints against their wives in regards to their sharp tongues with the hope of securing concession to hit them. Rather than conceding to hitting the wives, Rasulullah (Sallallahu Alaihi Wasallam) advised that they should terminate the marital relationship instead.

The famous Tabi'ee, Hadhrat Ata (Rahimahullah) mentions: "If a wife refuses or opposes the command of her husband,

then too the husband will not hit her, rather he will be upset. Qadi Ibnul Arabi (Rahimahullah) has mentioned this statement of Hadhrat Ata (Rahimahullah) to be the culmination of his great intellect, insight, and understanding. (Ahkam ul Qur'an li Ibnil Arabi – V.1/PG.536)

The method of hitting wives in Shari'ah has been further elucidated in the following Ahadith:

Hadhrat Iyas ibn Abdullah reported that the Messenger of Allah (Sallallahu Alaihi Wasallam) said: "Do not beat Allah's handmaidens (wives). After this advice, Hadhrat Umar (Radhiyallahu Anhu) came to the Messenger of Allah (Sallallahu Alaihi Wasallam) and said: "Women have become emboldened towards their husbands". He (the Prophet) Sallallahu Alaihi Wasallam gave permission to hit the wives. After this, many women came to the wives of Rasulullah (Sallallahu Alaihi Wasallam) complaining against their husbands. So the Messenger of Allah (Sallallahu Alaihi Wasallam) said: 'Many women have come to my wives complaining about their husbands hitting them. Those husbands who hit their wives are not good people.' [Sunan Abu Dawud: Pg. 479, Vol. 3 – Dar Ar-Risalah Al-alamiyyah]

From the above narration, it is clearly understood that Rasulullah (Sallallahu Alaihi Wasallam) disliked the practice of hitting the wives. However, considering the fact that in various communities/societies there exists some disobedient and transgressive women (as elaborated by Hadhrat Umar (Radhiyallahu Anhu), the ruling of hitting has not been absolutely prohibited.

If the matter has reached such a stage where the husband and wife cannot mutually resolve their differences, then this conflict and tension will not only affect the couples but shall have a negative impact on both families and the society hence, the matter shall no longer remain their confidential issue but will become a community/public issue. In this regard, the Qur'aan has addressed and explained the Muslim welfare societies or judges (who are in charge of the Muslim welfare societies) how to resolve issues between spouses.

In surah Nisaa, Ayat 35, Allah Ta'ala says:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا [النساء: 34، 35]

Translation:"And if you fear dissension between the two send an arbitrator from his people and an arbitrator from her people if they both desire reconciliation Allah will cause it between them. Indeed, Allah is ever knowing and acquainted (with all things)" (Surah Nisaa: Verse,35)

The summary of the discussion is if the relationship has reached such a crucial stage where there is no hope of mutual reconciliation, then the Qadhi (Muslim judge) or Muslim judicial committee should appoint two members/parties and conduct an arbitration/adjudication. One member from the husband's family and the other member form the wife's side. The two members should be pious,sincere, and knowledgeable about the case. They will be responsible to hear the statements and arguments of both, the husband and wife and will try their best to reconcile the two. It is the promise of Almighty Allah that, if both the parties have firm intention of goodness and reconciliation to resolve the matter, Allah Ta'ala will bring harmony between the two. When arbitrators

would report to Hadhrat Umar (Radhiyallahu Anhu) that inspite of their efforts, they failed to reconcile the couple, Hadhrat Umar (Radhiyallahu Anhu) would alert them by saying, "You people did not try your best to resolve the matter. Try again!"

It is the promise of Almighty Allah that if the arbitrators try to sincerely resolve the dispute, Allah will definitely bring harmony and will reconcile the two.

Eventually, if the arbitrators fail to resolve the issue, and according to them the only way to overcome / avoid the controversies/conflicts between the spouses is to annul the Nikah, then in that case, if the husband is ready/wants to terminate the Nikah, it is simple. But if the husband is not willing to terminate the relationship, do the arbitrators have the right to terminate this relationship?

The Muslim jurists are of two views on this issue: According to Imam Malik (Rahmatullahi Alaih), if the arbitrators confirm that annulment of the Nikah shall be the only solution to this case, then they (arbitrators) will have the right to terminate the Nikah even if the husband objects. But most of the Muslim jurists are of the view that it will not be permissible for the arbitrators to do so.

In order to remove conflicts between husband and wife, and to create a harmonious marital relationship, Allah Ta'ala has prescribed four measures in Surah Nisaa. If one practises upon these measures, then all domestic issues will be resolved. Then there won't be the need for Talaq or separation.

DIVORCE IS REGARDED AS AN UNDESIRABLE ACT IN ISLAM

Rasulullah (Sallallahu Alaihi Wasallam) has expressed great dislike towards divorce in various narrations:

Hadhrat Abdullah ibn Umar (Radhiyallahu Anhu) narrated, the Prophet (Sallallahu Alaihi Wasallam) said, of all the lawful acts, the most detestable to Allah is divorce. [Sunan Abu Dawud: Pg. 305, Vol. 3 – Dar Ar-Risalah Al-alamiyyah]

Just as it is undesirable for the husband to initiate/issue talaq without any valid cause, similarly it is disliked by Almighty Allah and His beloved Rasul (Sallallahu Alaihi Wasallam) for the wife to demand talaq without any valid reason.

Shaytan gets happy when a couple gets separated, this can be understood from the following narration:

Hadhrat Thawban (Radhiyallahu Anhu) narrates that the Messenger of Allah (Sallallahu Alaihi Wasallam) said: 'Any woman who asks her husband for a divorce when it is not absolutely necessary, the fragrance of Paradise will be forbidden to her.' [Ibn Majah: 2055]

Hadhrat Jabir (Radhiyallahu Anhu) narrated that the Prophet of Allah (Salallahu Alaihi Wasallam) said: "Iblis places his throne on the water and he dispatches his army (to cause mischief). The closest shaytans to Iblis in rank are those who are most notorious in causing mischief. One of the shaytan comes to Iblis and reports: "I did so and so." Iblis says: "You have done nothing." Then one amongst them comes and says: "I did not spare so and so until I sowed the seed of discord between a husband and a wife." Iblis goes near him and says:

"You have done well." A'mash said: He (Iblis) then embraces him. [Sahih Muslim, pg. 2167, vol. 4 – Dar Ihyaa At-turath Al-Arabi]

From the above narration, we understand that shaytan gets immensely happy upon the separation of the spouses and he congratulates those shaytans who bring about separation between the spouses. The happiness of the Shaytan is due to a home being destroyed, consoliding the enmity between two families and giving Iblis the opportunity to spread unlimited mischief and deviation.

DIVORCE (TALĀQ) IS AN UNAVOIDABLE NECESSITY

Despite the fact that ending a marriage or giving a divorce (talāq) may be an extremely abhorrent act, one cannot deny the reality that at times, this act becomes an unavoidable necessity. At times, natural harmony is not found between a husband and wife; even though both are pious and noble, they are incompatible for one another due to immense differences between them in their temperaments, attitudes, and individual habits.

In such a case, if all attempts to amend the situation by creating harmony lead to a total failure, there is no benefit for any of the parties (the husband, wife, or the society) in binding the two spouses to the institution of marriage through legislative force.

The flag of marriage can only be at full mast if the wind of mutual affection, love, trust, and cooperation is blowing. The purpose of a marriage can never be fulfilled if there is an environment of evil presumptions, mistrust, hatred, and enmity.

It is for this reason that Islām has shown us the method of dissolving a marriage if such a situation were to occur, and despite the notion of divorce being detestable, Islām has not completely prohibited it.

The unavoidable necessities of life cannot be deferred. Thus, a system should be put in place to accommodate these necessities. In even the most affluent and fashionable areas of a city, sewage pipes are found beneath the ground. If a municipality were to announce that they no longer require these dirty pipes and decide to close them, what would happen to the city? All the roads and pathways would be impossible to cross due to the filthy water and slime, as well as its horrid stench and smell.

RECOGNISING THE NEED FOR DIVORCE (TALĀQ)

Despite the fact that 50 years ago, the Islamic system was criticised with a plethora of disapprobation for its validation of divorce (talāq), the world now sees that the notion that was once considered a fault in Islam is the same notion that is now considered a merit of Islam. In every political and religious dispensation, the vision of Islam with regards to divorce (talāq) has been adopted in some form.

In the Hindu religion, as mentioned by the representatives of the religion from the latter centuries, divorce (talāq) was not considered permissible. Eventually, however, the Hindu members of the Indian parliament formed a Hindu Code Bill in which permission for divorce (talāq) was granted.

Even still, the conditions and restrictions added to the Code Bill with regards to the permission of divorce (talāq) are such that it does not fulfill the requirements of the Hindu society

with regards to divorce (talāq). For this reason, at times, a Hindu husband has to go to the extreme of converting to a different faith in order to free himself from a disliked wife.

The Christians also did not allow divorce (talāq). However, after constant demand and pressure, all the Christian countries gradually brought in laws to facilitate the right of divorce (talāq). Demand for the right of divorce did not only come from men, in fact, women's rights groups were also persistent and ardent in their demand.

Despite the fact that in western countries, the right of giving permission for divorce lies in the hands of a court, the incidents of divorce (talāq) are perpetually on the rise. The institution of marriage and the notion of divorce (talāq) have become sport and play. The tranquillity of family life has been destroyed.

WHO SHOULD HAVE THE AUTONOMY OF DIVORCE?

We have agreed that in some instances, divorce (talāq) becomes an unavoidable necessity for a human being. We have also agreed that to keep a husband and wife tied to the institution of marriage even when it has completely broken down is manifest oppression upon the two spouses as well as upon the society. However, the question arises: to whom should the autonomy of divorce (talāq) be given in order to facilitate minimal aggravation and a deliverance of justice in the entire procedure of divorce (talāq)?

There are four possibilities:

1)The autonomy of divorce (talāq) is jointly given to both the husband and the wife; just as the institution of marriage was formed through their consent, it should not be revoked except through a joint consultation and decision by both parties.This possibility is compatible with the Shari'ah of Islam.

If a man and a woman mutually agree to end their marriage, they have the right to do so. In Islamic jurisprudence, this is referred to as Khula'. The Qur'ān itself and the Prophetic teachings mention the permissibility of Khula'.

However, this is not the only method of ending a marriage in the Islamic Shari'ah. In fact, there are other methods which we shall elaborate upon soon.

2)The autonomy of divorce (talāq) is given to the husband alone.

This option is also compatible with the Shari'ah of Islam. From an outside perspective, this may come across as a strange view that the institution of marriage which only came into existence through the consent of both the man and the woman, may be ended through the decision of one party.

However, due to various profound reasons supported by wisdom (which shall be elaborated upon soon), Allah The Most High has given the autonomy of divorce (talāq) to the husband alone. Along with this, the husband has been advised not to use his autonomy of divorce (talāq) frivolously. In fact, he has been guided by the Qur'ān and Prophetic teachings towards the proper manner of giving a divorce (talāq).

3)The autonomy of divorce is given to the wife alone.This option is not compatible with the Shari'ah of Islām. In Islāmic law, a woman alone has not been given the autonomy of divorce (talāq). This ruling is one which serves to the benefit of women. We shall shed light upon the reasons as to why a woman has not been given the autonomy of divorce in the coming chapters.

Although Islam has not given the sole autonomy of divorce (talāq) to a woman, Islām has emphasised that a woman must not be oppressed or hurt in any way whatsoever. For this reason, if a husband does not fulfill the rights of his wife or oppresses her, the woman shall have the right of presenting her case to a judge with the hope of having her marriage anulled.

4)The autonomy of divorce is not given to the husband, nor is it given to the wife. Rather, the issuing of a divorce and autonomy of divorce is left to the discretion of a judge. Whosoever from the husband or wife wishes to end the marriage shall be required to go to a court, file for a divorce (talāq), and establish the claims and reasons behind such a decision.

The judge shall then summon the other party and avail him or her the opportunity to respond to the claims.Finally, if the judge feels that the claim for divorce (talāq) is reasonable and understandable, he shall annul the marriage. Otherwise, he shall discard the claim.In the current times, the family laws administered by a country generally grant the autonomy of divorce (talāq) to a court supporting the claim that by taking away the autonomy of divorce (talāq) from the husband and giving it to the courts, it shall reduce the rate of divorce, bring oppression upon women to a halt and shall also protect their family rights. Islam does not concur with this argument.

We shall soon elaborate that the reports of those countries that have adopted the practice of granting the autonomy of divorce to the courts show that instead of decreasing the rate of divorce, this practice has actually increased the rate of divorce and has not decreased the oppression upon women in a significant manner.Through this law, there is less benefit and more harm for women and the society in general.

IS IT APPROPRIATE TO HAND OVER THE RIGHT OF DIVORCE TO THE COURTS?

It is vital and important to first and foremost discuss why Islam has not given the right of divorce at all to the courts, although this appears to be most logical since a husband and wife are two separate persons in this matter. Each one may demand/threaten divorce some time or the other by being overridden with emotions at times.

On the other hand, the judge is an understanding and neutral personality. He is the only one who can determine whether the demand of divorce is due to an abrupt disapproval of an act or due to interim emotions or the feud between them has escalated to such a state that there is no scope of the relationship remaining.

In order to understand this point better, it is vital and necessary to have a clear insight on the correct nature and spirit of the relationship of Nikah.

Nikah is not based on absurd laws. The entire success of Nikah is wholly based on love and affection between the husband and wife and having complete trust on each other. Without love and affection, unity and trust, the relationship of Nikah cannot be kept by mere absurd laws. Even if this

lifeless Nikah is somehow kept, instead of it being a priceless bounty and happiness, both will perceive restrain and unhappiness.

This reality should also be borne in mind that the relationship and bond of marriage is very sensitive and delicate. There are so many means/causes for the husbands' heart to be wearied from the wife and for the emotions of hatred to be entrenched in his heart, that they cannot be brought to the justice of the court and sometimes the grounds of divorce are of such a nature that there is no benefit to the woman in bringing such cases to court. In fact, keeping such issues a secret is better for them.

Understand these brief points through few examples:

1.Assume that a Nikah took place between Khalid and Zainab whom are both pious and devout, however there is a world of difference between their habits and nature. Because of there being no compatibility in their nature, there is resentment on petty issues. This daily resentment and disputes have developed into hatred. Now Khalid has no space left in his heart for Zainab. In this situation, Khalid is willing to end his Nikah with Zainab.

Now if he goes to the court and gives true reasoning for a divorce, the court does not give him permission to do so, because according to the court, Zainab has not done such an act that warrants a divorce. Now Khalid has only two ways; either he wrongfully accuses her (of fornication etc.) and brings forth false witnesses and releases himself from her.

In this case there is no doubt that Khalid will be a sinner. Apart from that, Zainab will have her public image tainted and this will make it extremely difficult for her to get another match.

The second scenario is that after having exhausted all means and instead of him being able to relieve himself from Zainab, he is forced by the rule of law to keep Zainab in his marriage. It is obvious that when Khalid's heart is broken/hardened from Zainab and his heart has been entrenched with emotions of hatred, so how then will he fulfil Zainab's due marital rights? It is possible that perhaps due to having the fear of Allah or fearing the rule of law, he may keep giving Zainab maintenance, however, it is far-fetched that Zainab will be receiving that love, affection and harmony which holds greater importance than maintenance.

2.The husband is extremely possessive over his wife, let's assume that he has complains in regards to his wife being immoral. After having cautioned and reprimanded her several times, he sees no change in her and she is still involved in those immoral habits. The husband is coerced to terminate this relationship with her. Now if the husband was given the sole right of divorcing his wife, he will do so silently without anyone knowing.

Through this, the husband would be relieved and the shameful act of the wife would also remain concealed. It is possible that she would repent from this evil act and get married to another person.

On the other hand, by handing the court the right of divorce, the husband and wife's paths are blocked. If the husband has

to go the court and give a true account of the event and seek divorce, the wife would be infamous and notorious in the eyes of the community even before the judge has issued a decree. Her standing and status in society is highly tarnished/ stained. (Even if the court clears her of the accusations). She cannot show her face to anyone. Allah Forbid, if this case has to come to the knowledge of journalists!

It is apparent that if fictitious stories are not made and false witnesses are not brought forth, then it's a tough task to prove lewd acts. That's why, if the husband has only sufficed on truthfulness, then he will not be able to prove his claim and thus he will not be given the right of divorcing his wife by the courts.

In this situation, how will he then be able to bear and fulfil the demands and requisites of a marital life. Even though, according to law and paper, they will be in the bond of Nikah, however, practically they will be living as though they are not married, in fact even worse than that. The wife specifically will be placed in an uphill calamity.

In these types of situations, many persons of nobility and dignity do not take the matter to courts due to fear of defaming their families and as such continue living with swallowing their blood (extremely difficult). Instead of the bond of marriage being a bounty and mercy, it turns to be a psychological, mental and financial burden.

THE COURTS RIGHT OF ISSUING A DIVORCE AND THE EXPLANATION OF DIVORCE

By giving the right of divorce to the courts, the increase and decrease in such cases will be confined on how loose/broad or how constricted the reasoning's of divorce has been kept. In those countries where the reasoning's/causes of divorce have been kept broad, especially more in favour and respect of the wife, then in such cases by giving the right of divorce to the courts, the cases of divorces escalate to alarming rates.

The wife becomes extremely unhappy with the husband due to a certain matter, by being overridden with extreme emotional interim moods, she decides that she cannot bear living with her husband, she then applies for annulment of marriage to the courts.

According to the courts, she qualifies to apply for annulment on this basis that the wife is not prepared to live with her husband, the judge then annuls the marriage. Because in view of the court, the insistence of the wife in annulling the marriage may be due to her suffering grossly at the hands of her husband, even though the wife cannot prove/ justify her claim.

The current concept of her being deemed a victim of oppression in all situations is a result of the legalising and action of the courts. As a result, many a times, the legitimate/valid interests and welfare of the husband and children are negatively affected. In specific, the husband suffers huge monetary and family loss.

Very often the wife becomes remorseful on her actions, after her anger having cooled off and her coming into her senses after making a rash decision. However, the husband does not

risk bringing her back to his Nikah because of his bitter past experience with her.

Due to opening the doors of divorce wide open, marriage and divorce have become a play in western countries. Marriage relations have become very unstable. The rates of divorce are increasing at an amazing pace.

The daily marriage and divorce is causing great harm to those boys and girls who came into existence due to the short period enjoyment of their parents. After becoming deprived of the love and upbringing of the parents, they become a target of different types of sicknesses, bad habits, psychological and mental disorder, even though the government might provide them with medication, upbringing and high level of education standards.

The daily increase of children who are getting deprived of the love of the parents and upbringing of the family culture are becoming a dangerous fear to the community. These children easily get caught by the evil spreading groups. They get involved in bad habits. Instead of using their talents in the development and upbringing of the country, their talents are used in destroying and bringing the country to a downfall.

After handing over the power of giving divorce in control of the judge, if the limits and conditions of giving divorce are kept strict, then the bad situations are created on the other hand.

If the government gives the power of divorce to the husband only when he can prove the fornication or evil act of his wife through witnesses, then even if the wife did these types of evils and the husband witnessed them and has the knowledge

of those evil practices, how is he going to present witnesses for all these evil practices? Most of such evils are done in privacy.

To give lawyers and judges a chance to conduct a deep investigation is not in the interest of a woman. The poor lady won't be able to show her face in the society irrespective of the decision of the court. And if the wife did not get involved in fornication or any other evil through which the government gives the right to the husband to divorce his wife, but the husband hates his wife because of her bad habits and not having same temperaments, the husband hates his wife with complete soul and mind and the husband heart is not inclined towards his wife in any way, then there are only two ways if he decides that he does not want to lie and present a false accusation. It is either he wont go to the court and if he does go to the court he will be unsuccessful.

In this situation, the marriage will remain based on the government rule, but instead of the marriage becoming a means of happiness, comfort and joy, the marriage will become a distressful painful one. The daily inner fights will frustrate the family more.

A husband in whose heart is filled with the hatred might pay expenses of the wife due to government fear, but it won't be possible for him to give his wife love and comfort. In this situation keeping the marriage is not beneficial, especially when both are young, there is a great fear. It is either they will keep fighting or they will look for non-permissible ways to fulfil their passion and end up losing their honour, chastity and dignity. And if the husband decides to get rid of his wife at any cost, then the situation will get worse than before.

Through the advice of the lawyer, the husband ends up putting false accusations on his wife such as fornication and other evils and claims for a divorce through false proofs and documents.

In this era, when religious teachings and good character and conduct are a scarcity and wealth has attained a status of been worshipped and the intelligent lawyers and government workers who are talented are involved in making the truth into lies and lies into truth, to present false proofs and accusations in the court through expert lawyers is not difficult for the husband.

Whatever will be the decision of the court will spoil the future of the wife and she will become suspected in the eyes of the family. What can be a greater harm for a woman than this?

If the husband does not succeed in getting rid of his wife through false accusations, then he will look for other criminal ways of getting rid of his wife.

Only Allah knows how many women are being killed and burnt in different countries because their husbands hate them and could not divorce them due to government rules. Our media is filled with information about women being burnt and killed by husbands.

Is divorcing of hundred women of great concern or killing of fifty women? It is something to ponder upon.

ONE DECISION OF THE SUPREME COURT AND THE SUBSIDIARY ISSUE OF DIVORCE

Few years ago, the Supreme Court made a big uproar based on the claim of four Hindu women whose husbands accepted Islam and remarried. According to the judge, these four men accepted Islam because they wanted to get rid of their wives. If the findings of the judges were true, then a shocking reality is in front of us. The Hindu Code Bill needs to be adjusted as it cannot facilitate the causes of divorce in the Hindu custom. Hence, there is a need to change and expand the Hindu Code Bill.

In our Indian community, changing religions is not an easy task. After changing religions, one gets cuts off from his family and community and is faced with many difficulties, especially if he has left Hinduism and become a Muslim. Therefore, a person who has the courage to leave Hinduism and become a Muslim will only do so in one of two situations:

1.His beliefs have actually changed due to research and pondering. He has such firm belief in the truthfulness of Islam that he would rather cut away from his community and face difficulties as he cannot bare to stay on his old religion which he believes to be false and baseless.

2.His beliefs have not changed; in terms of beliefs, he is still a Hindu. However, he has accepted Islam due to a severe difficulty or torment that he is facing which he cannot be saved from except by changing his religion.

For example, he has formed severe hatred and enmity towards his wife and is not willing to stay with her under any condition. However, according to the Hindu Code, he does

not have the right to divorce which is why he would rather change his religion in order to separate from his wife, in spite of knowing the challenges that he will have to face upon changing his religion. However, in comparison to the difficulty of keeping his Hindu wife, he considers the difficulties and dangers of changing his religion to be easier and bearable.

SHORTCOMINGS OF THE HINDU CODE BILL

It is clear from the above analysis that the reasons for a divorce in the Hindu Code Bill are very narrow as they do not fulfil the needs of divorce within the Hindu community. This is why many educated and wealthy Hindu males even take the step of accepting Islam in order to leave their wives.

The solution for this difficult situation is that some changes be made to the Hindu Code Bill so that the reasons for issuing divorce are expanded or the husband is given the right to divorce. Imposing the Civil Code is not the solution to this difficulty. The negative consequences of imposing the Civil Code is that husbands who are frustrated with their wives will no longer be able to change their religion in order to gain freedom from their wives.

How will this solve the problems facing married women? A husband who is frustrated with his wife to such an extent that he resents her, does not want to see her face and in order to get freedom from her, does not even mind going to the extremes of changing his religion, shall not be able to stay in the same house as his wife.

This attitude, we fear, will increase oppression on Hindu women and no court will be able to prevent such oppression.

Recently, some shameful news was published that a Hindu husband made his brother and nephew rape his wife so that he may be able to leave his wife due to the person not having the right to divorce his wife without her being immoral according to the Civil Code.

It is clear from the above analysis that to hand over the complete right of divorce to the court is not in the interest of the husband and wife, and not in the interest of the community. It does not decrease the rate of divorce and neither does it fulfil the needs of divorce. The only outcome is the personal spousal secrets becomes exposed in the courts and becomes public talk. This leads to humiliation for both the husband and wife. A better alternative is to quietly and amicably terminate the marriage so that both do not get disgraced and their secrets are not exposed.

DIVORCE THROUGH MUTUAL AGREEMENT BETWEEN THE HUSBAND AND WIFE:

In the previous pages, we have highlighted the argument that granting the autonomy of divorce solely to the court is not beneficial for the husband, wife or the society in general. The actual objectives of a divorce are not even fulfilled through this method.

Now, we wish to discuss the issue of granting the autonomy of divorce jointly to both the husband and wife i.e. if a legislation were to be made that a divorce cannot be given without mutual agreement and consensus between the two parties and neither of the two parties would have the sole autonomy of

ending a marriage, how would this work out?It cannot be disputed that if a husband and wife were to mutually agree upon ending their marriage, they should have the right to do this. Islam has given the husband and wife this right, it is known as Khula'.

However, to limit the methods of divorce to this one method is not an appropriate measure at all. Many incidents are found in which one partner, either the husband or the wife wishes to end the marriage in all instances whilst the other is not at all prepared for the marriage to end. Hence, in the many hundreds and thousands of situations where this occurs, divorce would not take place even though one of the two partners, either the husband or wife, has become vexatious and frustrated to such an extent that emotional hatred has reached its summit in his or her heart for the other partner.

The institution of marriage can only be successful and prosperous if the hearts of the two partners connect with one another, the hearts of the two partners have love and respect for one another and the two companions have complete trust over one another. Therefore, it is not appropriate in any way whatsoever to create the restriction that a marriage can only be dissolved through mutual agreement between the husband and wife. The result of this shall be that in order to escape from the other partner, the vexed partner shall commit a deeply unlawful and destructive act.

WHY DOES THE HUSBAND HAVE THE RIGHT OF DIVORCE?

Shariah grants the unilateral right of divorce only to the husband. If the husband does not fulfil his responsibilities or he is oppressing his wife, the wife could request a judge for the annulment of her marriage. However, she does not have the right of divorce. What is the reason for granting this right only to the husband and what is the rationale behind it? What has Shariah considered and the wisdom behind it? This can be understood from the following points.

To answer this question lies in the nature of roles that a husband and wife assume in a married life. In an Islamic society, a husband bears all the financial burden which results from a marriage contract. It is he who has to pay dower to his wife. It is he who has bear the expenses incurred during the wedding in terms of walima etc. It is he who has to support his family financially and provide a home to the wife and children.

The wife on the other hand, does not have to provide even a small share of the family expenses, although she could take some responsibilities upon herself to save a percentage from her husband's income.

On the flip side, the wife receives gifts and dowry which boosts her finances tremendously. The husband have to bear the brunt of all the expenses after marriage and even after divorce. If the husband has not discharged the dowry due to the wife, then he would be asked so settle it immediately. During the iddah period, the husband has to continue to bear the financial expenses incurred by the wife. The husband also has to maintain his sons who have not yet attained maturity

and he has to maintain his daughters as well. In fact the divorced wife will be remunerated for the time she looks after their sons who have not yet attained puberty.

Moreover, when a man who has divorced his wife wishes to marry another woman, he has to pay similar expenses which makes the whole idea of divorce and remarriage a very costly affair. Thus if one acts according to the teachings of Islam through divorce, a woman does not suffer any financial loss and in addition she sometimes acquires added financial benefits.There are so many duties and responsibilities on the husband after marriage and even after divorce that any man would think twice before going through the process of marriage and divorce because he realises that it constitutes a great financial on him. Thus, in view of this expected financial loss, a husband thinks very carefully before he decides to terminate his marriage.

A question may arise that why should the husband bear the responsibility of the expenses after marriage and after divorce and why the wife dont bear some expenses also?

To understand the answer one should first unravel the inherent natures of every male and women. To fathom this a detailed discussion is necessary.

One of the main reasons, for a man holding the right of divorce is he is more capable of controlling his emotions especially in disputes with his wife, whereas women are more emotional and hasty.

If the wife had been given the right of divorce, there is a possibility of abuse whereby the wife could divorce the husband on minor issues due to her being unable to control her emo-

tions, thus leaving the husband with a substantial financial burden.According to Sheikh Abu Zuhra, those women who secured an undertaking from her potential husband to transfer the autonomy of divorce to her, the rate of giving divorce is higher. We can blow our trumpets to prove the equality between men and women, the reality is that we can never delete the different temperaments of both genders.

We cannot deny the fact that some women can control their emotions and temper better than man, however rules are designed according to the general situation and not according to rare situations. Even though the right of divorce is held by the husband, Shariah has also taken into consideration that the wife is not oppressed and she could ask for the annulment of her marriage through a judge when the husband oppresses her or does not fulfil his duties.

DISSOLUTION OF MARRIAGE BY A JUDGE

There are many options available for a woman to dissolve her marriage for example,

1. Absent husband: absconding or missing

2. Failure to provide maintenance: inability or refusal

3. Husband is insane

4. Husband is impotent

5. Severe abuse: Physical or other

6. Serious health condition or disease: leprosy or any such disease that could endanger the wife.

According to Imam Malik (Rahimahullah), when a judge presides over a marital dispute and the disputing spouses present their witnesses and it has not become clear who is the transgressing party due to the wife not presenting her claim of annulment clearly, the judge can grant the application of the woman if he feels the discord between the spouses is too deep and there is fear of more harm in maintaining the marriage.

Furthermore, if there is insistence on handing over the sword of divorce to the delicate hand of the wife, then there is a leeway for that as well. If at the time of the Nikah or after the Nikah, the husband hands over the anatomy of divorce to the wife or a third party, then the wife or third party may exercise that right which cannot be revoked by the husband.

IMPORTANT ADVICES PERTAINING TO DIVORCE

While Islam has given the husband the right to issue divorce, it has also set certain guidelines. If those guidelines are considered, then the use of the right of divorce will be exercised in extreme desperation and as a last resort after all avenues of resolving the disputes and attempting a reconciliation have failed.

Furthermore, if one considers the procedure of divorce in Islam, the door of a dignified reconciliation remains open. Some of the important and fundamental advices from the Quran and Sunnah pertaining to divorce are;

1)If someone wishes to divorce a woman with whom he was intimate, he should issue one talaq raj'ee (revocable divorce) after her menstrual cycle has ended without engaging in conjugal relations. He should not issue a divorce during her menstrual cycle or in a clean cycle in which they were intimate.

The wisdom behind this is that during her menstrual cycle, the husband may feel disinclined towards her as she is not clean and there are restrictions to being intimate with her. Similarly, the husband may feel disinclined towards his wife after being intimate with her in a clean cycle. On the contrary, his divorce in a clean cycle where his emotions are still strong indicating his complete detachment from his wife and divorce being his final recourse.

2)Secondly, the husband is advised to suffice on one talaq raj'ee. This is the best form of divorce because if the husband regrets his decision, he still has the opportunity to revoke his divorce within the 'iddah period. Revoking the divorce will not necessitate a renewal of the Nikah or dowry and the initial Nikah will remain intact.

If he does not revoke the divorce within the 'iddah period, the divorce will be finalized with the completion of the 'iddah period and their Nikah will terminate. However, if they wish to remarry, they shall have the option to do so.

3)If the husband is adamant on giving three talaqs, Shariah advises him to give one talaq raj'ee in a clean cycle in which he did not have intercourse with his wife. Thereafter, he should give the second talaq raj'ee approximately a month later; after her second menstrual cycle finishes. He should give the final talaq after her third menstrual cycle.

The husband still has the option of revoking the first and second talaq within the iddah period if he wishes to restore the marriage. If he chooses not to give the third talaq and allows her iddah period to finish without revoking the talaq, they can still consensually remarry.

After the third talaq, the husband cannot revoke his talaq nor can the husband and wife remarry regardless of their desires.

4)Shariah advises these methods of divorce so that the husband and wife are availed an opportunity to ponder and reflect over the situation, understand and restore their relationship, and rectify their flaws.

5)Islam has bestowed a great favor to women by limiting the number of talaqs to three and has prevented the marital life from becoming a mere child's play. In the pre-Islamic era, the Arabs would not have any limited number of talaqs. After every talaq, the husband had the right of taking back his wife. In this manner, many husbands would revoke these divorces before the completion of the Iddah. This system of talaq and revoking continued for many years. Thus, the wife was never able to get deliverance from her oppressive husband nor was she able to conduct herself as a typical wife should.

Islam then abolished this practice and uplifted this oppression; which gave the husband the right to issue unlimited talaqs and revoke the talaq thereafter. Islam also put such mechanisms in place which restricts the husband from reconciling with his wife and remarrying her during her Iddah after issuing three talaqs. Consequently, the respect and awe for Nikah was restored.

6)Violations of the Islamic teachings of talaq is a grave sin. For example, to give talaq during menses, giving three talaqs at once and giving more than one talaq in the state of tuhr (purity). Hadhrat Umar (May Allah be pleased with him) would punish husbands who would give three talaqs at once.

Currently, due to the lack of understanding of Deen and lack of consciousness of the fear of Allah, there has been a rise in the violation of the laws of talaq taught by Islam.

Many arrogant men think talaq is not even valid unless you give three talaqs, this is why three talaqs are given. Some give talaq during periods, some give talaq on trivial arguments. In relation to this, two things are very important.

1.In order for this ignorance to be removed, the understanding of the laws of Nikah and talaq should be given importance. It should be advised that to give talaq without any necessity or to give talaq against the teachings of Islam is a grave sin. There will be great accountability for this in the court of Allah.

2.A communal effort should be made to explain to people not to take the matters of Nikah and talaq lightly. The awareness of giving talaq without necessity and to give it in the wrong manner should be made. A penalty should be imposed for those who violate the laws of talaq and if there is a need then a social boycott should be implemented.

The prevention of wrong doings is not only stopped by the laws. At times, a social boycott is very effective. Many reputable Darul Iftaas have agreed that an appropriate penalty should be imposed for those who violate the laws of talaq or a social boycott should be implemented.

In relation to this, a question which was posed to Mufti Rasheed Sahib (May Allah have mercy on him) is presented.

TA'ZEER (PENALTY) IS WAJIB ON THE PRESENT (WRONG) WAYS OF TALAQ

Question: *In this day and age, the most detestable of lawful actions to Allah (i.e. talaq) has become quite common, due to which trespassing the laws of Allah, corruption of the mind and rebellion are common in society. Nevertheless, it is undeniably the right of the man to issue talaq in any given circumstance. In most cases of talaq, the man himself is the oppressor and hastens in issuing talaq. Is issuing talaq a punishable crime in this case? The punishment applicable in this situation would be that his fellow fraternity display animosity towards his actions and disassociate themselves from him until his mockery of the commands of Allah comes to an end. Is this penalty in the form of disassociation and social boycott permissible or not?*

Answer: Nowadays there are many sins committed in the way divorce is issued. The correct method of issuing talaq is for the husband to issue one revocable talaq (talaq-e- raj'ee) while the wife is in a state of purity in which conjugal relations did not take place. This should only be done once a sincere effort was made to reconcile and advice was sought from upright and honest people. Hereunder are some of the mistakes committed when giving talaq:

1. Talaq is given without any thought or consideration and without hesitation

2. A sincere effort to reconcile is not carried out

3. Upright and honest family members were not consulted before issuing divorce

4. Istikhara was not made

5. Talaq is given during the menstrual cycle

6. One thinks it is necessary to give two or three talaqs at once

7. Many adopt the detested practice of halalah since that is the only method of reconciliation available after issuing three talaqs. Some even avoid halalah and choose instead to involve themselves in Zina for the reminder of their lives.

Based on the above-mentioned points, it is necessary that the government enforces a severe penalty. In case the government turns a blind eye to these situations, then the penalty of social boycott and disassociation should be enforced. [Ahsanul Fatawa, Pg. 194-5, vol. 5]

RECIPE FOR A SUCCESSFUL MARRIAGE
BY: MUFTI EBRAHIM DESAI

Question: *Every human being by nature has an instinct to dispute. This instinct becomes more manifest between the husband and wife, thus leading to marital disputes. How can this instinct be controlled?*

Answer: Consider the following ten points to control the instinct of dispute and maintain a happy marriage.

1. Fear Allah: It was the noble practice of Nabi salallahu alayhi wasallam to conscientise the spouses about the fear for Allah before performing a Nikah by reciting the verses (Nisa v14, Ahzab v69, Aali-Imraan v101) from the Quraan. All the verses are common in the message of Taqwa (fear of Allah). The spouses will be first committed to Allah before being committed to their partner. There can be no doubt in the success of a marriage governed by the fear of Allah.

2. Never be angry at the same time: Anger is the root cause for all marital disputes. One Sahabi came to Rasulullah salallahu alayhi wasallam and sought some advice. Rasulullah salallahu alayhi wasallam replied, control your anger. The same advice was rendered three times. (Mishkaat pg.433; HM Saeed)

3. If one has to win an argument, let it be the other: Nabi salallahu alayhi wasallam said: "Whoever discards an argument despite being correct shall earn a palace in the centre of Jannah. (Ibid pg.412)

4. Never shout at each other unless the house is on fire: Luqman (AS) while offering advice to his son said: " and low-

er your voice for verily the most disliked voice is that of a donkey". (Surah Luqman v19)

5. If you have to criticize, do it lovingly: Rasulullah salallahu alayhi wasallam said, 'A Mu' min is a mirror for a Mu'min.' (Abu Dawud vol.2 pg.325; Imdadiyah) Advise with dignity and silently.

6. Never bring up mistakes of the past: Nabi salallahu alayhi wasallam said: "Whoever conceals the faults of others, Allah shall conceal his faults on the day of Qiyaamah." (Mishkaat pg.429; HM Saeed)

7. Neglect the whole world rather than your marriage partner: Nabi salallahu alayhi wasallam confirmed the advice of Salman to Abu-Darda [RA] for neglecting his wife. "Verily there is a right of your wife over you." (Nasai Hadith2391)

8. Never sleep with an argument unsettled: Abu Bakr radiallahu anhu resolved his dispute with his wife over-feeding the guests before going to bed. (Bukhari Hadith 602)

9. At least, once everyday, express your gratitude to your partner: Nabi [sallallaahu alayhi wasallam] said, 'Whoever does not show gratitude to the people has not shown gratitude to Allah.' (Abu Dawud pg.662; Karachi)

10. When you have done something wrong, be ready to admit it and ask for forgiveness: Nabi [sallallaahu alayhi wasallam] said, 'All the sons of Aadam commit error, and the best of those who err are those who seek forgiveness.' (Tirmidhi Hadith 2499)

HUSBAND & THE RIGHT OF DIVORCE

This book in your hands exhibits the rationale and wisdom of Islamic Laws of divorce. It also points out the negative consequences of State/Judicial interferences in Muslim Personal Law which undermines the entrenched clause of Freedom of Religion in India.

- Mufti Ebrahim Desai, South Africa
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